

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 04-070

Duties of Jail Inspectors under Tenn. Code Ann. § 41-4-116

QUESTIONS

1. Under Tenn. Code Ann. § 41-4-116, the county commission may appoint three county residents to act as jail inspectors. Are the jail inspectors appointed under this statute obligated to comply with the Open Meetings Act, Tenn. Code Ann. §§ 8-44-101, *et seq.*?
2. Is the sheriff entitled to advance notice of an inspection by the jail inspectors?
3. Does the right to inspect the jail extend to an audit of confidential drug funds?
4. Withdrawals from drug funds require two signatures and are subject to audit by the Comptroller of the Treasury. In view of the need to maintain the anonymity of the informants buying the drugs, do the jail inspectors have a right to inquire into any of these transactions?
5. If the jail inspectors are entitled to inquire into the use of drug funds, may the sheriff keep secret the individuals given the money to make the undercover buys?
6. If any jail inspector reveals the identity of any confidential informant, has the jail inspector committed a criminal act?
7. Does the county commission have the right to appoint any committee to audit individual drug funds?
8. May the county commission appoint members of the county commission as jail inspectors under Tenn. Code Ann. § 41-4-116, or must they be from outside the county commission?

OPINIONS

1. Under *Neese v. Paris Special School District*, 813 S.W.2d 432, 435 (Tenn. Ct. App. 1990), whenever the jail inspectors convene to make a decision or to deliberate toward a decision, their gathering is a meeting subject to the notice and other requirements of the Open Meetings Act. At the same time, on-site inspections of the jail, whether the inspectors conduct them alone or with one another, would ordinarily not be meetings subject to the Open Meetings Act, so long as the inspectors do not, in conjunction with the inspection, deliberate toward a decision.

2. The statute contains no such requirement. But if, in the course of the inspection, the inspectors intend to deliberate toward a decision, then that inspection is a meeting that is subject to public notice in accordance with the Open Meetings Act.

3., 4., 5., and 6. We think the statute refers to a physical inspection of the county jail and does not include the authority to audit or otherwise inquire into the use of county drug funds held under Tenn. Code Ann. § 39-17-420 or Tenn. Code Ann. § 39-17-328. Because of the answer to Question 3, Questions 4, 5, and 6 are moot.

7. Ordinarily, audits of county funds are conducted by the Comptroller or a private contractor. But, under Tenn. Code Ann. § 39-17-420(a)(1), the budget for funds in the special revenue fund for drug programs and enforcement must be approved by the county commission. The county commission, therefore, is authorized to inquire into the use of monies in the funds as part of its budgetary oversight function.

8. The county commission may not appoint commission members as jail inspectors under Tenn. Code Ann. § 41-4-116.

ANALYSIS

1. Compliance with the Open Meetings Act

This opinion addresses the interpretation of Tenn. Code Ann. § 41-4-116, which provides as follows:

(a) The county legislative body may, at its January term each year, appoint three (3) householders or freeholders, residents of the county, of lawful age, to act as jail inspectors for the ensuing year, or the court may appoint such inspectors at any other time to act for a shorter period.

(b) The county mayor shall be an ex officio inspector of the jail in each county.

(c) It is the duty of the inspectors appointed to:

(1) Visit and examine the county jail at least once each month;

(2) Make rules and regulations for the preservation of the health and decorum of the prisoners;

(3) Decide all disputes between the jailer and the prisoners;

(4) Provide for the restraint, by ironing or segregation of prisoners who offer violence to fellow prisoners or to the jailer or the jailer's assistants, or for attempting to break jail; and

(5) Make a report, at each meeting of the county legislative body, of the state and condition of the prisoners and the jail.

The first question is whether the jail inspectors appointed under this statute must comply with the Open Meetings Act, Tenn. Code Ann. §§ 8-44-101, *et seq.* The act declares that it is the policy of the State that the formation of public policy and decisions is public business and shall not be conducted in secret. Tenn. Code Ann. § 8-44-101. Under the act, all meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Tennessee Constitution. Tenn. Code Ann. § 8-44-102(a). The statute provides notice and other requirements regarding the meetings of a governing body. “Meeting” means the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. Tenn. Code Ann. § 8-44-104(b)(2). “Meeting” does not include any on-site inspection of any project or program. *Id.*

The Tennessee Court of Appeals has stated that, under the Open Meetings Act, a meeting exists if a public body convenes for one of two purposes: (1) in order to make a decision or (2) in order to deliberate toward a decision. *Neese v. Paris Special School District*, 813 S.W.2d 432, 435 (Tenn. Ct. App. 1990). The court used the definition of “deliberate” from *Black’s Law Dictionary* and said, “To deliberate is ‘to examine and consult in order to form an opinion [T]o weigh arguments for and against a proposed course of action.’” *Neese*, 813 S.W.2d at 435. Deliberation under the Open Meetings Act “refers to discussing, debating, and considering an issue for the purpose of making a decision and does not include a discussion solely for the purpose of information gathering or fact finding.” *The University of Tennessee Arboretum Society, Inc. v. The City of Oak Ridge*, slip op. (E.S. Tenn. Ct. App. May 4, 1983), *permission to appeal denied* (August 29, 1983).

The key issue in this inquiry is whether the jail inspectors are a “governing body” as defined under the Open Meetings Act. The Act defines “governing body” in relevant part as follows:

- (b) (1) "Governing body" means:
 - (A) The members of any public body which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public body on policy or administration

Tenn. Code Ann. § 8-44-102(b)(1).

The term “public body” is not defined in the Open Meetings Act; however, the Tennessee Supreme Court has noted with respect to the term:

It is clear that for the purpose of this Act, the Legislature intended to include any board, commission, committee, agency, authority or any other body, by whatever name, whose origin and authority may be traced to State, City or County legislative action and whose members have authority to make decisions or recommendations on policy or administration affecting the conduct of the business of the people in the governmental sector.

Dorrier v. Dark, 537 S.W.2d 888, 892 (Tenn. 1976), *rehearing denied*, 540 S.W.2d 658 (Tenn. 1976).

The statute authorizes, but does not require, a county commission to appoint three jail inspectors. The inspectors are required, among other functions, to visit and examine the county jail at least once a month, make rules and regulations, and report to the county commission on the state and condition of the prisoners and the jail. The statute does not expressly provide that the jailers are members of a committee. Clearly, however, to carry out at least some of their duties — to make rules, for example — the jail inspectors must act as a group. We think that a court would conclude that whether a particular meeting is subject to the requirements of the Open Meetings Act would depend on the facts and circumstances. Under *Neese*, whenever the jail inspectors convene to make a decision or to deliberate toward a decision, their gathering is a meeting subject to the notice and other requirements of the Open Meetings Act. On-site inspections of the jail, however, whether the inspectors conduct them alone or with one another, would ordinarily not be meetings subject to the Open Meetings Act, so long as the inspectors do not, in conjunction with the inspection, deliberate toward a decision.

2. Notice of Jail Inspection

The second question is whether, under Tenn. Code Ann. § 41-4-116, the sheriff is entitled to prior notice of an inspection by the jail inspectors. The statute contains no such requirement. But if, in the course of the inspection, the inspectors intend to deliberate toward a decision, then that inspection is a meeting that is subject to public notice in accordance with the Open Meetings Act. Tenn. Code Ann. § 8-44-103.

3., 4., 5., and 6. Inspection of Drug Funds

The next question is whether, under Tenn. Code Ann. § 41-4-116, jail inspectors are authorized to audit confidential county drug funds. The request does not specify the statutes under which these funds are held. The legislature has provided certain financial incentives for county and municipal agencies involved in civil and criminal drug enforcement activities by providing funding for drug enforcement, education, and treatment programs, and for certain nonrecurring law enforcement programs. On the criminal side, the sources of the funds are fines and the proceeds from certain bond forfeitures. Tenn. Code Ann. § 39-17-420. On the civil side, the funding comes from the proceeds from the sale of property forfeited as a result of illegal drug activity. Tenn. Code Ann. § 53-11-451. We assume this question refers to funds held under the statutes governing use of these funds.

Under Tenn. Code Ann. § 39-17-420(a)(1), certain criminal fines and forfeitures for drug law violations are to be accounted for in a special revenue fund of the jurisdiction that initiated the arrest. The statute also governs the proceeds of goods used in connection with the manufacture or

distribution of narcotics seized and forfeited under Tenn. Code Ann. § 53-11-451.¹ Monies in the fund may be used only for local drug enforcement, education, and treatment programs, and for nonrecurring general law enforcement expenditures. Cash transactions related to undercover investigative operations of county or municipal drug enforcement programs must be administered in compliance with procedures established by the Comptroller. Similarly, under Tenn. Code Ann. § 53-11-415(a), as a general matter, the county must account for funds received under Tenn. Code Ann. §§ 39-17-401, *et seq.*, in a special revenue fund. Upon demand of the chief executive of the arresting law enforcement agency, the county must pay the agency the funds demanded for use in cash transactions related to undercover investigative drug enforcement operations. Tenn. Code Ann. § 53-11-415(a). The amount of the funds demanded and the requirement to pay the funds are subject to the availability of funds and budgetary appropriations for that purpose. *Id.*

Under Tenn. Code Ann. § 41-4-116, jail inspectors are authorized and required to “[v]isit and examine the county jail” at least once each month and “[m]ake a report, at each meeting of the county legislative body, of the state and condition of the prisoners and the jail.” We think the statute refers to a physical inspection of the county jail and does not include the authority to audit confidential county drug funds. Those funds are held under an entirely different statutory scheme from the one in which the jail inspector statute appears. While Tenn. Code Ann. §§ 41-4-101, *et seq.*, refer to the housing of inmates in county jail facilities, Tenn. Code Ann. §§ 39-17-401, *et seq.*, define drug crimes and related law enforcement activities, and Tenn. Code Ann. §§ 53-11-401, *et seq.*, impose penalties for narcotics offenses. For this reason, jail inspectors are not authorized to audit or otherwise inquire into the use of drug funds held under Tenn. Code Ann. § 39-17-420.

In light of the answer to Question 3, Questions 4., 5., and 6 are moot.

7. Committee to Audit Individual Drug Funds

The next question is whether a county commission has the right to appoint a committee to audit individual drug funds. Again, we assume the question refers to the special revenue fund discussed above. Ordinarily, these funds are subject to audit by the Comptroller or an independent auditor. Tenn. Code Ann. § 9-3-201. In addition, Tenn. Code Ann. § 39-17-429(a) provides that “[t]he sheriff’s department shall be accountable to the county legislative body . . . for the proper disposition of the proceeds of goods seized and forfeited under the provisions of § 53-11-451, and for the fines imposed by § 39-17-428.” Some of the fines collected under Tenn. Code Ann. § 39-17-428 are held in the special revenue fund described in Tenn. Code Ann. § 39-17-420. Tenn. Code Ann. § 39-17-428(c)(1). Under subsection (b), the sheriff must submit an annual audited report of the funds to the county commission. When the Comptroller conducts an audit, that audit satisfies

¹ Tenn. Code Ann. § 40-33-211 provides for the disposition of property seized under Tenn. Code Ann. § 53-11-451, among other statutes. Subsection (a) of this statute provides that, “[i]f any other provision of law requires that the proceeds from seizures, confiscations and sales made under one (1) of the sections set out in this subject (a) be deposited in a special fund, the provisions of such other provision shall control.” Since Tenn. Code Ann. § 39-17-420 explicitly requires the proceeds of goods seized and forfeited under Tenn. Code Ann. § 53-11-451 to be placed in a special fund, that statute controls over Tenn. Code Ann. § 40-33-211.

this requirement. We think it can be inferred from these statutes that the county commission is not authorized to appoint a committee to perform an additional audit of the funds in the special revenue fund. But, under Tenn. Code Ann. § 39-17-429(a), the sheriff is “accountable” to the county commission for the use of the funds. Further, under Tenn. Code Ann. § 39-17-420(a)(1), the budget for funds in the special revenue fund for drug programs and enforcement must be approved by the county commission. The county commission, therefore, is authorized to inquire into the use of monies in the funds under Tenn. Code Ann. § 39-17-429(a) and as part of its budgetary oversight function.

8. County Commission Appointing Commission Members as Jail Inspectors

Finally, the request asks whether the county commission may appoint commission members as jail inspectors under Tenn. Code Ann. § 41-4-116. No statute addresses this issue. But courts in this state have indicated that it is contrary to public policy to permit an officer having an appointing power to use such powers and means of conferring an office upon himself or to permit an appointing body to appoint one of its own members to an office. *State ex rel. v. Thompson*, 193 Tenn. 395, 246 S.W.2d 59 (1952). Based on that opinion, this Office has concluded that a local legislative body cannot elect or appoint one of its own members to an office over which it has the power of election or appointment. Op. Tenn. Att’y Gen. 98-004 (January 5, 1998); Op. Tenn. Att’y Gen. U92-129 (December 14, 1992); Op. Tenn. Att’y Gen. 88-166 (September 9, 1986). Under this reasoning, therefore, the county commission may not appoint commission members as jail inspectors under Tenn. Code Ann. § 41-4-116.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

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Requested by:

Honorable Frank Buck
State Representative
Suite 24, Legislative Plaza
Nashville, TN 37243-0140